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BY HAND DELIVERY

Jeff S. Jordan, Esq.
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Please date stamp this copy and give to messenger to return to Perkins Coie

Re: MUR 7142

Dear Mr. Jordan:

On behalf of Senate Majority PAC and Rebecca Lambe in her official capacity as Treasurer ("Respondents"), we submit this letter in response to the Complaint filed by the Foundation for Accountability and Civic Trust ("Complainant") on September 29, 2016 ("the Complaint").

The Complaint falsely alleges that a communication paid for by Senate Majority PAC was coordinated with the Evan Bayh Committee ("the Campaign"), resulting in a prohibited in-kind contribution to the Campaign. The Commission has made clear on numerous occasions that the activity alleged in the Complaint does not provide a basis to find that a communication is "coordinated." As the Complaint does not allege any facts showing that coordination took place, and because no coordination did take place, the Complaint fails to state any facts that, if true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Commission should therefore dismiss the Complaint and close the file.

FACTUAL BACKGROUND

Senate Majority PAC is an independent expenditure-only political committee registered with the Federal Election Commission ("FEC"). Senate Majority PAC is committed to complying with all campaign finance restrictions imposed by the Act and accompanying FEC regulations, including the coordinated communication rule at Section 109.21; Senate Majority PAC regularly files 24 and 48-hour reports certifying that its independent expenditures were not made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or authorized committee or agent of either.

The Complaint falsely alleges that Senate Majority PAC coordinated with Mr. Bayh's campaign ("the Campaign") when it produced and distributed an advertisement bringing to light

Congressman Todd Young's position on Social Security. The sole basis for the allegation is a message posted on the Campaign's website that discussed Congressman Young's position on Social Security, a major policy issue that has a bearing on the quality of life and economic well-being of retirees. The Campaign's website contains a significant amount of content about the records and policy positions of Congressman Young and Evan Bayh. The page in question ("Hoosiers Need To Know") is publicly accessible and resembles other content on the Campaign's website. The specific language used in the advertisement does not resemble the excerpt from the "Hoosiers Need To Know" page, nor does the Complaint allege that Senate Majority PAC republished campaign material.

Contrary to the allegations made in the Complaint, no coordination occurred between the Campaign and Senate Majority PAC. Senate Majority PAC created, produced, and disseminated the advertisement independently of any candidate, candidate's committee, or any agents of the foregoing.

LEGAL ANALYSIS

A. The Complaint Does Not Allege Facts Establishing that the Advertisement is a Coordinated Communication

A communication is a "coordinated communication" under 11 C.F.R. § 109.21 only if it satisfies the three prongs of the coordination standard, including one or more of the conduct standards set forth in 11 C.F.R. § 109.21(d). Because the Complaint fails to provide facts showing any request, suggestion, or assent, substantial discussion, or material involvement on the part of the Campaign or its agents in connection with the advertisement, the Commission should find no "reason to believe" a violation of the Act occurred.

The notion that the Campaign posted the message to communicate to Senate Majority PAC that it should run the advertisement is based on nothing more than speculation. Indeed, the Complaint does not point to a single fact to support that allegation. The Commission has repeatedly stated that unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.[1] That rule applies here, and the Complaint's allegation of coordination should be dismissed.

The Complaint fails to set forth facts sufficient to allege that the Senate Majority PAC coordinated with the Campaign. The Commission has roundly rejected the idea that "a communication resulting from a general request to the public or the use of publicly available information, including information contained on a candidate's campaign website," satisfies the

[1] *See* Statement of Reasons, Commissioners Mason, Sandstrom, Smith, and Thomas, MUR 4960 (Dec. 21, 2001).

conduct standards.[2] Nor do "alleged thematic similarities of [] communications [] and their rough temporal proximity [] give rise to a reasonable interference" that the conduct standards were satisfied.[3] Rather, thematic similarities between a third party advertisement and campaign materials are "reasonably attributed to the common sense conclusion that most parties and candidates will be addressing a defined set of campaign issues in their advertising. The Commission has no legal basis to assign a legal consequence to these similarities without specific evidence of prior coordination."[4] Here, there is no indication of prior coordination.

It is no surprise that the Campaign website and the advertisement employed similar critiques of Congressman Young. It is well known that Congressman Young's position in favor of privatizing Social Security is among his political liabilities. Notably, in the context of a congressional election in 2010, Congressman Young was criticized by his opponent, Congressman Baron Hill, in the same way.[5] As the Commission recognized just last year when it dismissed a similar complaint in MUR 6821, the mere fact that the Campaign and Senate Majority PAC are criticizing Congressman Young for similar issues plainly does not give rise to a finding that the entities engaged in coordination.[6]

B. The Conduct Prong Has Not Been Satisfied

The Complaint alleges that the advertisement was created and distributed at the request of the Campaign, satisfying the conduct prong of the coordination standard. That allegation is wrong as a matter of law. The Complaint fails to state a coordination claim under Commission regulations. The Commission's regulations are clear that campaign communications appearing on a publicly available website—such as the Campaign message—are *never* a basis to find that the conduct prong has been satisfied.

In 2003, the Commission published its revised coordination rule. As part of the rule, the Commission established that a "request or suggestion" by a campaign that a third party disseminate a communication on its behalf satisfied the "conduct prong."[7] However, the Commission clarified in its Explanation and Justification that a request or suggestion on a publicly available website could *never* satisfy the "conduct prong." As the Commission explained:

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[2] Factual and Legal Analysis, MUR 6821 at 8 (Dec. 2, 2015) (citing *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 432 (Jan. 3,2003); *Coordinated Communications*, 71 Fed. Reg. 33190, 33205 (June 8, 2006)).
[3] *Id.*
[4] *See* Statement for the Record, Commissioners David M. Mason, Bradley A. Smith, and Michael E. Toner, MUR 5369 at 5 (Aug. 15, 2003).
[5] *See* Eugene Kiely, *Social Security: (Mostly) in Their Own Words*, FactCheck.org, Sept. 21, 2010, http://www.factcheck.org/2010/09/social-security-mostly-in-their-own-words/.
[6] Factual and Legal Analysis, MUR 6821 at 8 (Dec. 2, 2015).
[7] 11 C.F.R. § 109.21(d)(1).

> The "request or suggestion" conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).[8]

Three years later, the Commission again clarified that the use of publicly available information by a third party did *not* satisfy the conduct prong. The Commission explained, "[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate's or political party's Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication."[9]

Indeed, as recently as last year, the Commission reiterated that "a communication resulting from a general request to the public or the use of publicly available information, including information displayed on a candidate's campaign website, does not satisfy the conduct standards."[10] Accordingly, the Commission declined to find reason to believe that coordination occurred based on the alleged facts that an independent expenditure-only committee sponsored advertisements similar in theme to messages that had been posted on a candidate's publicly available campaign website and later publicly "tweeted" by a political party committee. This matter compels the same result.

The Complaint fails to allege any facts showing that the Campaign made a "request or suggestion" that Respondents disseminate any advertisements on its behalf. The Complaint offers no evidence of any communication actually directed at Respondents. Rather, just as in MUR 6821, the alleged "request" was directed to the public at large on the Campaign's website.[11] The Complaint's argument that the advertisement constitutes a coordinated communication fails as a matter of law.

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[8] *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (emphasis added).
[9] *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).
[10] Factual and Legal Analysis, MUR 6821 (Dec. 2, 2015).
[11] The Complaint insinuates that the Campaign message was not publicly available by stating that the message was placed on an "obscure" page. Compl. at 5. However, Complainant itself recognizes that the notion that the Campaign website— http://evanbayhforindiana.com/—is not publicly available is meritless. The website at issue here was clearly publicly available, and is unlike an "intranet service or [] electronic mail" sent directly to a discrete group of recipients. *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

CONCLUSION

The Commission may find "reason to believe" only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.[12] Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.[13] The Complaint does not set forth sufficient specific unrebutted facts, which, if proven true, would constitute a violation of the Act. For the reasons set forth herein, the specific facts that it does allege—that Senate Majority PAC sponsored an advertisement similar in theme to a message that was posted on the Campaign's publicly available website—does not constitute a violation of the Act.

Accordingly, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter.

Very truly yours,

Marc E. Elias
Ezra W. Reese
David J. Lazarus
Counsel to Respondents

[12] *See* 11. C.F.R. § 109.21(a).
[13] *See* Statement of Reasons, Commissioners Mason, Sandstrom, Smith, and Thomas, MUR 4960 (Dec. 21, 2001).